SUPREME COURT OF THE STATE OF COLORADO

Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

BRIEF AMICUS CURIAE OF THE COLORADO BAR ASSOCIATION, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ORGANIZATION OF WOMEN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE COLORADO WOMEN'S BAR ASSOCIATION, THE COLORADO HISPANIC BAR ASSOCIATION, THE COLORADO LESBIAN AND GAY LAW ASSOCIATION, THE COLORADO CRIMINAL DEFENSE BAR, THE ASIAN AMERICAN BAR ASSOCIATION OF COLORADO, and PEOPLE FOR THE AMERICAN WAY

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Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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The Colorado Bar Association, the Colorado Trial Lawyers Association and numerous other state and national legal and civil rights organizations respectfully submit this brief amicus curiae in support of plaintiff-appellees' lawsuit challenging the constitutionality of "Amendment 2". While plaintiffs' action raises a number of significant constitutional issues, this brief addresses only a single question: Is it permissible under the Equal Protection Clause of the Fourteenth Amendment for a state to withdraw the rights of a particular group of people from the political and democratic processes of representative government? Amici submit that the answer to that question is that such discrimination is constitutionally impermissible absent proof by the state of a compelling interest -- a showing that, concededly, it cannot make in this case.[1/]

The right of citizens to participate in the process of government -- the right to vote, the right to be represented in a republican form of government, the right to petition the government for redress of grievances -- are core democratic values and have been recognized as such under both the United

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1/ We do not limit our discussion because we believe that plaintiffs' other claims lack merit (indeed, see footnote 5, infra), but because protecting the process of government is a matter of particular concern to amici, particularly inasmuch as Amendment 2 purports to exclude gays and lesbians as much from the "judicial" process as from the "legislative [or] executive" ones. See Reitman v. Mulkey, 387 U.S. 369, 377 (1967). See also p. 23, infra. While the Court need not reach the question addressed by amici if it agrees with plaintiffs' other contentions, it is equally true that the Court can affirm the order entered below on the basis of our equal protection argument without reaching issues concerning gay rights generally, including whether Amendment 2 is, as a matter of substantive law, rational.

States and the Colorado constitutions. See, e.g., Reynolds v. Sims, 377 U.S. 533, 562 (1964); Jarmel v. Putnam, 499 P.2d 603 (Colo. 1972). Actions which interfere with the exercise of such fundamental rights by particular individuals or groups are, under settled law, subject to strict scrutiny. Reynolds v. Sims, 377 U.S. at 562; Williams v. Rhodes, 393 U.S. 23, 31 (1968).

Amendment 2 does not merely burden the exercise of participatory rights by gay men and lesbians in the State of Colorado. It effectively obliterates those rights on a wholesale basis. In a single stroke, Amendment 2 not only repeals a number of laws and ordinances previously enacted for the benefit of gays and lesbians, but effectively removes them from the political give and take of every "branch", "department", "agency" and "subdivision" of the State of Colorado -- leaving them, for all intents and purposes, political "non-persons" so far as the protection of their rights and interests is concerned. While it, surely, is permissible for the people of Colorado to speak to the subject of gay and lesbian rights, the equal protection clause, equally plainly, prevents the wholesale evisceration of meaningful political participation by an identifiable group of citizens. Amendment 2 is the ultimate exercise in political class gerrymandering. As such, it goes too far and must, accordingly, be held unconstitutional.

I. THE CENTRAL ROLE OF PROCESS AND PARTICIPATION IN OUR CONSTITUTIONAL SYSTEM.

We tend to think of government in substantive terms: creating programs or agencies, conferring benefits or proscribing certain forms of behavior. From a constitutional perspective, however, government is concerned at least as much with process and participation as with substance. See generally Ely, Democracy and Distrust (Harvard, 1980) ("Ely"). In fact, the particular genius of James Madison and the other principal architects of the constitution was that they focused upon the process by which successive governments would be selected and, once chosen, how they would represent the people who elected them. See Ely, at 77-82.

Representative government, in short, was considered a value in itself. See Madison, Federalist No. 10 (Mentor ed. 1961). Indeed, one of the principal concerns that fueled the drive for American independence was the perceived tyranny of English rule in which power was exercised by a few, from afar. Thus, creating a government based on popular (i.e., majority) will was a cornerstone of Madisonian Democracy.

However, while majority rule was considered a necessary condition of government, it was not, by itself, sufficient. Tyranny also could be imposed on minorities by the majority. Hence, a central dilemma facing the framers was how to accommodate these competing concerns. As Hamilton succinctly put it in the ratification debates: "Give all power to the many, they will oppress the few. Give all power to the few, they will

oppress the many."[2/] See also, Madison, Federalist No. 51 (Mentor ed. 1961) at 323 ("It is of great importance...not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part").

The result of this tension was "a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side and the desire to limit their sovereignty on the other." Dahl, A Preface to Democratic Theory, (U. Chi. 1956) at 4. Put otherwise, the constitution establishes a representative (i.e., "republican") form of government while, simultaneously, limiting its power. The majority rules, but not absolutely. For example, under the Bill of Rights, there are certain things that cannot be done to anyone. More pervasively, the constitution establishes "a strategy of pluralism," that is, a strategy "of structuring the government...so that a variety of voices would be guaranteed their say and no majority coalition could dominate." Ely, at 80.

There is one more brief, but essential, stop on this abbreviated review of American constitutional theory. As Professor Ely points out, the original constitution "is a rightly renowned system, but it didn't take long to learn that from the

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2/ The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Elliott ed.) (Lippincott, 1941) at V, 203.

standpoint of protecting minorities it was not enough." Id. at 80-81.[3/] Thus, by the mid-nineteenth century

> a frontal assault on the problem of majority tyranny was needed. The existing theory of representation had to be extended so as to ensure not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities. Naturally that cannot mean that groups that constitute minorities...can never be treated less favorably than the rest, but it does preclude a refusal to represent them.... The Fourteenth Amendment's Equal Protection Clause is obviously our Constitution's most dramatic embodiment of this ideal. Ely at 82 (emphasis in original).

See also Dworkin, Taking Rights Seriously, 180 (1977)(minorities are entitled to "equal concern and respect in the design and administration of the political institutions that govern them").

In sum, then, the structure of the constitution embodies -- as central tenets -- three concepts that are critical to our analysis here: first, that ours is a system of representative government; second, that minority interests need to be protected against the potential tyranny of the majority; and, third, that a critical means of providing such protection is by guaranteeing citizens the right to participate effectively in the process of government. Again, Professor Ely:

> [C]ontrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," is

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3/ Interestingly, it was resentment towards legislation "hostile to the interests of the propertied and creditor classes" during the Jacksonian era that initially focused attention on these concerns. Ely, at 81. They were brought to a higher boil, of course, as the status of blacks became a central political issue prior to the Civil War. Id.

> that . . . the selection and accommodation of substantive values is left almost entirely to the political process . . . [T]he document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large -- with ensuring broad participation in the processes and distributions of government.

Ely, at 87 (emphasis added; citations omitted).

II. THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION PROTECTS PARTICIPATORY VALUES.

Government, of course, may discriminate. Indeed, it must. Ely, at 135. For how else could it function in a world of limited resources and unlimited appetites? Similarly, the decisions of the political branches, ordinarily, must be given substantial deference. For how else can the notion of popular government be effected? But, just as clearly, there are limits on the majority's right to enact its own self interest. For how else can the rights of the minority be protected? And, so, we come to the judiciary's confrontation with the unavoidable constitutional tension between majority and minority rights. Specifically, we come to Justice Stone's remarkable exposition of the issue in his famous footnote 4 in the Carolene Products case.[4/]

It is remarkable that the essence of the constitutional debate over the distribution and limits of political power could have been captured, simply and elegantly, in a single footnote in an otherwise unremarkable case concerning the legality of a federal statute prohibiting the interstate shipment of filled

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4/ United States v. Carolene Products Co., 304 U.S. 144 (1938).

milk. In passing upon defendant's contention that the law violated equal protection, Justice Stone recited the familiar rule that the right of a legislature to "draw lines" in enacting statutes was to be respected so long as there was any "rational" basis for its decision. See 304 U.S. at 152. Having done so, however, Stone apparently felt it important to set forth the limits of the majority's political prerogatives:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious...or national...or racial minorities...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.
>
> 304 U.S. at 152-53(n.4).

Stone's formulation is by now so thoroughly accepted as the paradigm of equal protection analysis that it typically is invoked without the formality of explicit citation or other reference. While its influence in support of minority rights is most familiar, its importance in regard to participatory values ("legislation which restricts [the] political process[]") is no less significant. See generally Freund, "The Judicial Process in

Civil Liberties Cases," 1975 U. Ill. L. J. 493.[5/] That is, of course, the portion of Justice Stone's footnote that most directly reflects the structural compromise between the potential despotism of the few against the many and the equally threatening tyranny of the many against the few. It is, as well, the specific portion of Stone's formulation that concerns us here.

Equal protection in the process of government has been at the heart of a virtual revolution in political participation jurisprudence over the last three decades.[6/] That revolution is reflected most prominently in the so-called reapportionment cases from the mid-1960's (see, e.g., Reynolds v. Sims, 377 U.S. 533, Wesberry v. Sanders, 376 U.S. 1 (1964), and Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)). However, it extends to such other matters as minority party rights,[7/]

[5/] Which is not to say that Stone's third category ("prejudice against discrete and insular minorities") is not equally apposite. Indeed, amici submit that, on any fair view, gays and lesbians are precisely the kind of "discrete and insular minorit[y]" that Stone's requirement for a "more searching judicial inquiry" was meant to comprehend. However, having limited ourselves to process concerns, we leave the development of this point to others.

[6/] In his leading treatise, Professor Tribe describes "rights of political participation" as a separately identifiable constitutional principle in which various "distinct interests" come together because they "spring from a common root." Tribe, American Constitutional Law, Ch. 13 (2d. ed. 1988) ("Tribe"). "At their core, all voting-related rights are rights to participate in [the] process, [of representative government] and the import of the process for our system of government freights them with their indisputable moment." Id. at 1062.

[7/] E.g., Williams v. Rhodes, 393 U.S. 29.

wealth or property restrictions,[8] and other similar roadblocks[9] to "effective" political participation.[10] Taken as a whole, these cases form the bedrock of our constitutional argument although, as discussed, our position rests upon an even more enduring and broad-based set of constitutional principles which the specific decisions embody without fully illuminating. See pp. 3-6, supra.

At the outset, it is important to be clear that the political "participation" cases do not involve, or depend upon, the presence of any "suspect" or "protected" class. Rather, it is participation, itself, that is valued and, hence, protected against discrimination by requiring a searching judicial review in which necessity, not rationality, is the touchstone of legality. See, e.g., Kramer, 395 U.S. at 627; see also Tribe, supra at 1085 (Equal protection "ordinarily... requires that a franchise restriction be shown necessary to serve a compelling state interest"). Indeed, the Supreme Court has emphasized repeatedly that the right of meaningful political participation

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[8] E.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[9] E.g.,Dunn v. Blumstein, 405 U.S. 330 (1972); Carrington v. Rash, 380 U.S. 89 (1965).

[10] There are also numerous equal protection cases involving efforts to deny or impair the franchise rights of racial and other ethnic minorities. See, e.g., White v. Regester, 412 U.S. 755 (1973); Rogers v. Lodge, 458 U.S. 613, 617(n.5) (1982); cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). See also pp. 13-16, infra. These cases are instructive in the sense that they reflect the frequency and persistence of efforts to disadvantage minorities by creating obstacles to their effective participation in the political process.

is the fountainhead of all other rights and, as such, merits the strongest possible constitutional protection. Reynolds v. Sims, 377 U.S. at 562; Wesberry v. Sanders, 376 U.S. at 17.[11/]

In attempting to derive the pertinent constitutional principles from the participation cases, it is useful to divide them into several different categories although, as we shall see, the boundaries between the various divisions are far from neat. First, there are what we may call the "qualification" cases, such as Harper, Carrington and Kramer. In these cases the right to vote at all depended upon satisfying some precondition, such as paying a poll tax (Harper), being a civilian (Carrington) or having property or children (Kramer). These cases, in general, are the easiest from an equal protection standpoint since the restrictions directly "fenced out" (Carrington 380 U.S. at 94) certain classes of voters. In each case, the Court applied strict scrutiny and invalidated the restriction. Kramer put the standard and its rationale most succinctly:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the

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11/ We have suggested previously that Amendment 2 also deprives gays and lesbians of their right to a republican form of government, as guaranteed by Article IV Section 4 of the Constitution. Although the Supreme Court generally has declined to adjudicate individual claims under the guaranty clause (beginning with Luther v. Borden, 48 U.S. (7 How.) 1 (1849)), it has acknowledged that individual rights might be protected under that clause in an appropriate case. See, e.g., Attorney General ex rel. Kies v. Lowrey, 199 U.S. 233, 239, (1905). There is no need to determine whether this is such a case, since the important point for present purposes is that the Court has protected these types of interests by "invok[ing] the equal protection clause of the fourteenth amendment to protect each individual's right to participation in state and local government on an equal footing." Tribe, at 398.

> governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 626-27).

See also Tribe, supra at 1086 (discussing Kramer: "The Court bottomed the need [for].... exacting scrutiny on the [fact that] right-to-vote.... cases challenge the very presumption upon which the minimal scrutiny standard is based -- namely, that the elected officials who enacted the statute fairly represent the community").

The second pertinent group of decisions are the so-called "reapportionment" cases, including Reynolds v. Sims, 377 U.S. 533, in which the Supreme Court established the historic "one man one vote" test that revolutionized political participation analysis under the Equal Protection Clause. See 377 U.S. at 577, 579. The reapportionment cases are the source of many of the Court's most ringing declarations about the importance of participation as an independent value and the consequent requirement that any effort to limit such participation must be subjected to the most searching scrutiny. For example, in Reynolds, the Court noted that:

> since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

377 U.S. at 562.[12/]

Obviously, we concur in that observation. It is, in fact, a seemingly inexorable proposition once one accepts the general theory of representative government discussed previously. See pp. 3-6, supra. Yet what is perhaps most noteworthy about the Court's statement is that Reynolds, itself, did not directly involve voter qualification or political participation at all: no one was precluded, or even impeded, from voting. Rather, the issue was participatory effectiveness, i.e., the right to have one's vote count the same as the votes of others. Prior to Reynolds and the other reapportionment cases, certain people's votes were less significant simply because of where they lived. Their influence on the political process was correspondingly reduced and their ability to achieve legislation made more difficult. Thus, the Court's conclusion in Reynolds, and innumerable subsequent cases, that such "dilution" violates the Equal Protection Clause reflects a judgment that the Constitution insures not simply the right to participate in the process of government, but the right to do so meaningfully.

The reapportionment cases, of course, present the issue of political participation in terms of protecting majoritarian interests -- the first prong of the Madisonian model. See p.3, supra. However, other cases make it clear that the guarantee of "effective" participation is not based upon the right of majorities invariably to prevail but, rather, upon the right of

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12/ See also Wesberry, 376 U.S. at 17 ("[E]ven the most basic, [rights] are illusory if the right to vote is undermined"); Dunn v. Blumstein, 405 U.S. at 336.

all voters to "effective" political participation. See, e.g., Williams v. Rhodes, 393 U.S. at 30. So, for example, in Illinois State Bd. of Elections v. Socialist Works Party, 440 U.S. 173 (1979), an Illinois statute that discriminated against minority parties in local elections was held invalid under the Equal Protection Clause because it impaired the ability of certain citizens to "express their political preferences" by "limiting the choices available" to them. 440 U.S. at 184. See also Lubin v. Panish, 415 U.S. 709, 723 (1974) (state may not require indigent candidate to pay filing fee).

Even more directly to the point, several cases have considered efforts to restrict the political and process rights of specific minorities. The three most important cases of this type are Reitman v. Mulkey, 387 U.S. 369, Hunter v. Erickson, 393 U.S. 385 (1969) and Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). They are, of course, "race" cases -- Reitman in whole and the others in part -- and they must be read against that background. However, we submit that it is error to treat at least the latter two decisions only as race cases.[13/] To the contrary, they speak in important respects to the issue of participation generally and, thus, to the question in this case.

13/ Reitman involved the legality of an amendment to the California constitution ("Proposition 14") that repealed laws prohibiting private discrimination in the sale of real property. The Supreme Court held that the law did not merely repeal existing laws forbidding racial discrimination but established the right to discriminate as state policy, thereby implicating equal protection analysis. 387 U.S. at 380-81. While Reitman plainly involved participation issues, the Court analyzed it solely as a race case. As such, it does not speak directly to the broader question presented here.

Indeed, the Supreme Court, itself, has recognized the relevance of these cases to efforts by political majorities to take the rights of particular people "off the table" of political discourse. See, e.g., Gordon v. Lance, 403 U.S. 1 (1971), discussed infra at 16-19.

Hunter involved a charter amendment enacted by the voters of Akron, Ohio, which required fair housing, but not other, municipal ordinances to be approved by the electorate, rather than the City Council. Unlike the bare 5-4 majority in Reitman two years earlier, the Supreme Court held by a vote of 8-1 that the Akron amendment deprived minority groups of equal protection since it "place[d] special burdens on racial minorities within the governmental process." 393 U.S. at 391. In reaching that conclusion, the Court unquestionably was concerned with the fact that the amendment was aimed at minority racial groups. However, the Court's opinion speaks more broadly. Thus, Justice White noted that Akron was perfectly free to require a plebiscite as to "all its municipal legislation." But "[h]aving done [otherwise]," it could "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." Id. at 392-93 (emphasis added). Importantly, in support of that proposition, the Court did not rely upon Reitman or other

"racial" voting cases[14/] but, instead, cited none other than Reynolds v. Sims. Id.

Justices Harlan and Stewart (both of whom had dissented in Reitman) concurred separately. After noting their disagreement with the Reitman majority, they observed that, in contrast to the California initiative, "the city of Akron [had] not attempted to allocate governmental power on the basis of any general principle." 393 U.S. at 395. Rather, the voters of Akron had acted with the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." Id. That, the concurring justices concluded, was constitutionally impermissible.

Thirteen years later, in Seattle School Dist. No. 1, the Court invalidated a similar initiative, adopted by Washington voters, which purported to deny local school districts the right to use mandatory busing to achieve racial integration. Relying upon Hunter, the Court held that in denying minority groups the right to seek favorable remedial programs from district school boards -- which otherwise continued to administer virtually all aspects of local school systems -- the voters had interfered impermissibly with the political process and unlawfully burdened the efforts of minority groups to secure public benefits. See 458 U.S. at 467-70.

14/ Such as, for example, Nixon v. Herndon, 273 U.S. 536, (1927); Smith v. Allwright, 321 U.S. 649 (1944), Anderson v. Martin, 375 U.S. 399 (1964) or Gomillion v. Lightfoot, 364 U.S. 339.

In so holding, the majority did not merely adhere to Hunter, but specifically identified (and embraced) Justice Harlan's "neutral principles" formulation as the "central principle" underlying the Court's decision in that earlier case. Specifically, the Court noted that laws which impose general requirements that affect the legislative process are not constitutionally infirm even if they make it more difficult for minority groups "to achieve favorable legislation." 393 U.S. at 394. "Because such laws make it more difficult for every group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" 458 U.S. at 470 (emphasis in original). By contrast, in both Hunter and the Seattle schools case, the initiative did "not attemp[t] to allocate governmental power on the basis of any general principle," but, rather, impermissibly burdened the rights of specific citizens. 458 U.S. at 470 (quoting Hunter 393 U.S. at 395 (Harlan, J.)).

Before turning to Amendment 2, itself, there is a final decision which, we believe, provides a critical gloss upon Hunter and the political participation doctrine generally. In Gordon v. Lance, 403 U.S. 1, the Court upheld a West Virginia statute that required supra-majority approval of any proposed increase in bonded indebtedness or state tax rates. Plaintiffs challenged the requirement as a violation of equal protection. The West Virginia Supreme Court agreed, relying "heavily" on the right to vote and "dilution" cases (in particular, Gray v. Sanders, 372

U.S. 368 (1963) and Cipriano v. City of Houma, 395 U.S. 701 (1969)).

The Supreme Court reversed. However, in doing so the Court adopted a standard of equal protection adjudication that, we submit, applies precisely to Amendment 2. Initially, the Court observed that the "dilution" cases, such as Gray, involved apportionment schemes which simply devalued certain votes for reasons having no bearing on the particular matter in issue. Cipriano,[15/] similarly, involved "no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as race, wealth, tax status or military status." 403 U.S. at 5 (citations omitted).

After dismissing those cases as inapposite, the Court turned its attention to Hunter, although that decision had not even been mentioned in the state Supreme Court's opinion.[16/] Having apparently raised the issue, itself, the Court distinguished Hunter on the ground that, unlike the West Virginia statute, which "applie[d] equally to all bond issues for any purpose, whether for schools, sewers, or highways," the municipal ordinance at issue in Hunter subjected "fair housing legislation alone . . . to an automatic referendum requirement." In further

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15/ Cipriano was a denial of the vote case, much like Harper, Kramer and Carrington. In fact, it was a companion case to Kramer, involving a requirement that voters on bond initiatives be "property taxpayers."

16/ Contrary to the Supreme Court's suggestion, the state court actually had relied most heavily on Reynolds, Kramer and Wesberry v. Sanders. See 170 S.E.2d at 786-90.

contrast to "the class singled out" in Hunter, the Court noted that it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." Id. at 5 (citing Carrington v. Rash).

Two things are significant about the Court's discussion of Hunter. The first is that the Court mentioned it at all since the issue in Gordon had nothing to do with race or any other "suspect" class. Second, although the Court recited the fact that the Akron ordinance "singled out" those "who would benefit from laws barring racial, religious or ancestral discriminations," nothing in Gordon's actual discussion of Hunter turned on the identity or nature of the particular class discriminated against. Rather, what was critical, according to Gordon, was simply the fact that there was such an "identifiable" class, whatever its nature. Put otherwise, the Court's suggestion that the West Virginia law would have been held unconstitutional if there had been some "independently identifiable group" that "favor[ed] bonded indebtedness" strongly implies that the critical issue for constitutional purposes was the existence vel non of discrimination against a particular group, not whether the specific group discriminated against was independently entitled to special consideration because of its protected status. See 403 U.S. at 5.

That implication becomes manifest two pages later in the Court's statement of the controlling constitutional standard:

"We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." 403 U.S. at 7. That, we suggest, is a sensible one. If participation -- indeed, "effective" participation -- is an independently protectible constitutional value[17/] courts must be suspicious of any effort to burden that value by "singling out" and impeding meaningful political participation by "identifiable" groups. That is true whether the inhibition relates to wealth, military service, property ownership, tax status or, as here, sexual orientation. It is, in short, the value of effective participation that the constitution protects, not merely its holder. Reynolds, supra. Compare Graham v. Richardson, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in Shapiro [v. Thompson, 394 U.S. 618 (1969)] was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement").[18/]

17/ Which, unquestionably, it is. See, e.g., Reynolds, supra; Dunn v. Blumstein, 405 U.S. at 336 ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens").

18/ In Davis v. Bandemer, 478 U.S. 109 (1986), six justices held that claims of gerrymandering directed at a particular political group presented a justiciable controversy. 478 U.S. at 118-27. In so holding, the Court discussed numerous cases in which race-based dilutions assertedly violated the constitution because of their effect upon a particular group's ability to influence the government. See, e.g., cases cited at footnote 10, supra. After expressly disclaiming any intention to affect the analysis in

(continued...)

III. AMENDMENT 2 UNCONSTITUTIONALLY BURDENS EFFECTIVE ACCESS TO THE POLITICAL PROCESS BY GAYS AND LESBIANS

Amendment 2 enacts no "neutral principle." It enacts, instead, a statewide system of mandatory political disenfranchisement of gay men and lesbians. By its terms, it repeals numerous anti-discrimination ordinances designed to prevent the denial of important civil rights to certain individuals based solely upon their sexual orientation. Even more pervasively, Amendment 2 prevents every governmental entity and agency -- from the state, itself, down to the smallest municipality or bureau -- from taking any future action to prevent, let alone remedy, discrimination based on sexual orientation. In short, Colorado has left gays and lesbians with no place in the political structure or processes of the state of Colorado to turn for relief.

But it is the amendment, itself, that cannot withstand equal protection analysis. The state's wholesale attempt to deprive gays and lesbians of the right to participate effectively

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18/ (...continued)
those cases (see id. at 132 (n.13)), the Court noted that it had "repeatedly stated that districting that.... 'operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population' would raise a constitutional question." Id. at 119 (emphasis in original). Further, although the Court was unable to agree on a single test for determining precisely when such a violation would occur, Justice White (and three other Justices) asserted that the key "question in such cases is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." 478 U.S. at 132-133. While White's opinion, itself, did not command a majority on this point, Justices Powell and Stevens disagreed only because they would have gone further than White in attacking attempts to disenfranchise particular political groups. See 478 U.S. at 161-180.

in the political process of government can be justified only by a compelling state interest -- a showing that defendants, understandably, eschew.

The purported new law is infirm in numerous respects. First, it directly affects the franchise rights of gays and lesbians in the state's various counties, municipalities and other self-governing political subdivisions. In that regard it goes far beyond the comparatively modest electoral roadblock that was struck down in Hunter. Amendment 2 flatly prohibits citizens in any local electoral body from enacting or enforcing any form of "gay rights" legislation. Moreover, instead of attempting to withdraw civil rights issues as a whole from local control, Amendment 2 simply "singles out" gays and lesbians, removing their rights from local political arenas. That, too, is unlawful. Hunter, 393 U.S. at 392-93; Seattle School Dist, 458 U.S. at 467, 470; Gordon v. Lance, 403 U.S. at 5. It is no answer that Colorado voters might eliminate local rule or abolish particular agencies altogether, or that it might, even, decide not to hold certain elections at all, for "once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia Board of Elections, 383 U.S. at 665. See also Seattle School Dist., 458 U.S. at 477 ("[I]t is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in

fact erected imposes comparative burdens on minority interests").[19/]

Amendment 2 also directly affects the voting rights of gays and lesbians by prospectively denying every political body in Colorado the right to enact any form of protective legislation that encompasses sexual orientation discrimination. As in Reitman, Amendment 2 goes well beyond the mere repeal of specific legislation. See 387 U.S. at 380-81. Rather, it "burdens all future attempts" to secure rights of any kind to gays and lesbians. Seattle School Dist., 458 U.S. at 483. What is more, unlike the far narrower statutes that still failed to pass constitutional muster in Reitman, Hunter and Seattle School Dist., Amendment 2 encompasses the rights and interests of gays and lesbians simpliciter. They are, in short, "relegated, by state fiat, in a most basic way to second-class status" within the governmental process. Plyler v. Doe, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).

The damage, of course, does not stop with the legislative function, statewide or local. Amendment 2 applies, as well, to the executive and judicial branches of government,

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19/ We do not, of course, contend that the right to equal access or equal effectiveness in the political process is absolute. A number of decisions uphold restrictions on access to the ballot or similar limitations on political participation. For the most part, these decisions involve restrictions on minority-party candidates or other restrictions directly implicating the ability of states to conduct fair and effective elections. See, e.g., Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986); Colorado Libertarian Party v. Secretary of State, 817 P.2d 998, 1001-6 (Colo. 1991). See generally Tribe, supra, chapter 13. However, we are not aware of any case in which either the United States Supreme Court or this Court has upheld the type of broad-based group exclusion contained in Amendment 2.

thus infringing upon the ability of gay men and lesbians to seek assistance there as well. That, too, violates equal protection by depriving gays and lesbians of the right to be heard. See, e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (access to agencies and courts is guaranteed as "part of the right of petition protected by the First Amendment"). Compare Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (n.9) (1991). Much of what government does, it does through executive or administrative agencies. This is particularly true in regard to the protection of civil rights. Yet gays and lesbians are "fenced out" from those parts of the political process as well.

Amendment 2 also materially infringes on the judicial function since, by its terms, courts also are precluded from applying the law -- even, presumably, the common law -- in a way that might support a "claim of discrimination" based upon sexual orientation. Compare, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 480-84, 595 P.2d 592, 606-8 (1979). This limitation is particularly pernicious since history has shown that the courts frequently have been "the sole practicable avenue open to a minority to petition for redress of grievances." NAACP v. Button, 371 U.S. 415, 430 (1963); cf. Reitman v. Mulkey, 387 U.S. at 377 (noting that Proposition 14 made the right to discriminate "immune from legislative, executive, or judicial regulation at any level of the state government" [emphasis added]).

In sum, although the government may elect not to allow certain claims or recognize certain rights, that is far different from closing the doors of government, as such, to an "identifiable group" for the purpose of precluding its members from seeking any form of right or benefit.[20/] Whatever the outcome of the process of government as to particular issues, it is a vastly different matter, constitutionally speaking, to structure the process itself so that meaningful participation is denied to particular individuals or groups. Seattle School Dist., 458 U.S. at 474 (impermissible to require one group "to surmount a considerably higher hurdle" in seeking government action). For all the reasons discussed above, that kind of intentional exclusion from the process of government "writ large" (Ely, supra at 87) cannot be squared with a "level playing field" approach to governmental access -- one that acknowledges the right of the majority to have things its way, but not through the exclusion of minorities from the process of governance, itself.

20/ In Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972), the Supreme Court held that a municipal ordinance which discriminated against particular forms of protected speech violated the fourteenth amendment by denying equal protection to non-labor pickets. After noting the close relationship of the first and fourteenth amendment issues (408 U.S. at 95 and note 3), the Court unanimously held that it denied equal protection for Chicago to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored ... views.... Selective exclusions from a public forum may not be based on content alone...." (Id. at 96). That, of course, is precisely what Amendment 2 purports to do in closing the portals of government selectively to gays and lesbians.

It is only through that process, after all, that minorities can become majorities.[21/]

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: April 30, 1993

Respectfully submitted,

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21/ Supporters of gay and lesbian rights were, of course, "majorities" in places such as Denver, Boulder and Aspen, prior to their votes being "reversed" by Amendment 2. It also, of course, is no answer to plaintiffs' constitutional objections that Amendment 2, itself, could be repealed. That is true of any vote, short of one abolishing the legislative function as a whole. It was true of the ordinances and initiatives in Reitman, Hunter and Seattle School Dist., to cite but a few examples. The constitutional infirmity in those cases, as here, is not that the process is closed in all respects and with no hope of reversal, but, rather, that non-trivial roadblocks have been placed in the path of an "identifiable group," thereby adversely affecting its ability to participate in the process of securing rights and benefits from the government.

CERTIFICATE OF MAILING

This is to certify that I have duly served the within BRIEF AMICUS CURIAE on all parties herein by depositing copies of the same in the United States mail, postage prepaid, at Denver, Colorado, this 3rd day of May, 1993, addressed as follows:

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